95-907

No.

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

RICHARD McNAUGHTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

1. Did the lower court err in declining to suppress Petitioner's pre-accusation statement to interviewing agents given while Petitioner was represented by counsel, but without counsel's knowledge or permission?

LIST OF PARTIES

In addition to the United States of America and Petitioner Richard McNaughton, Appellant Igor Veksler was a party to the proceeding in the court, the judgment of which is sought to be reviewed.

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No.

In The

Supreme Court of the United States

October Term, 1995

RICHARD McNAUGHTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard McNaughton respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on August 9, 1995, and as to which rehearing and rehearing *in banc* were denied by that Court on September 7, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit affirming the Petitioner's conviction on direct appeal and the

decision as to which certiorari is sought is reported at 62 F.3d 544, and is referenced in the Appendix hereto, page 1a, *infra.*[1]

The opinion of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's post-trial motions is reported at 848 F. Supp. 1195, and is referenced in the Appendix 18a, *infra.*[2]

STATEMENT OF JURISDICTION

The Petitioner was named in a multi-defendant indictment filed in the United States District Court for the Eastern District of Pennsylvania charging conspiracy, wire fraud, tax evasion, and RICO conspiracy. Following a jury trial, on May 24, 1994, all defendants were found guilty. Petitioner McNaughton was sentenced to a 40 month term of incarceration.

The Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit and that court filed a judgment and opinion affirming the Petitioner's conviction on August 9, 1995. A timely motion for rehearing with suggestion for rehearing *in banc* was filed on August 23, 1995, and the Third Circuit entered an order denying the motion for rehearing on September 7, 1995.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

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1. The Third Circuit's opinion is appended to the Petition for Writ of Certiorari filed on this date on behalf of Richard McNaughton.

2. The District Court's opinion is appended to the Petition for Writ of Certiorari filed on this date on behalf of Richard McNaughton.

STATUTORY PROVISION INVOLVED

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4.2 of the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania.

STATEMENT OF THE CASE

The factual history of the case is as fairly stated in the published opinion of the Third Circuit. Those facts, viewed in the light most favorable to the government, are as follows:

During 1991 and 1992, Richard McNaughton and Igor Veksler were involved in a scheme to evade federal and state taxes on sales of number two oil, a product that can be used as either home heating oil or diesel fuel. During this period, no taxes were imposed by the federal government or either New Jersey or Pennsylvania on the sale of number two oil for use as home heating oil. In contrast, the United States, New Jersey and Pennsylvania did tax the sale of number two oil when it was to be used as diesel fuel, and imposed that tax on the producer or importer who first sold the oil to a purchaser that did not hold a Registration for Tax-Free Transactions (IRS Form 637).

The tax evasion scheme in which McNaughton and Veksler participated involved the use of "daisy chains," a series of paper transactions through numerous companies, some of which were largely fictitious. In each "daisy chain," the change in characterization of number two oil from tax-free home heating oil

to taxable diesel fuel was effected through the use of a "burn company," which would purchase number two oil as tax-free home heating oil and then sell it to another company as diesel fuel. The burn company, which typically held an IRS Form 637, would produce invoices to its purchaser reflecting that the diesel fuel taxes has been paid and that the taxes were included in the price. Although the burn company was liable for the payment of taxes on the oil, it paid no taxes and typically existed for a brief time and then disappeared. The participants in the scheme took commissions on the sales at the step in which each participated.

On September 19, 1993, the United States filed a superseding indictment charging eighteen different defendants with various offenses related to the "daisy chain" operation. Both McNaughton and Veksler were charged with one count of conspiracy. McNaughton was also charged with twenty-three counts of wire fraud, three counts of attempted tax evasion, and RICO conspiracy. In addition to the conspiracy count, Veksler was charged with six counts of wire fraud and one count of attempted tax evasion.

On May 23, 1994, after a twenty-day trial, the jury convicted McNaughton on all counts. Veksler was convicted of the conspiracy and wire fraud counts and acquitted on the tax evasion counts. McNaughton was sentenced to a prison term of forty months, five years of supervised release, and a special assessment of $1,400. Veksler was sentenced to a prison term of twenty-six months, followed by three years of supervised release. These appeals followed.

On November 24, 1992, the government executed a search warrant at Atlantic Heating and Oil, BELL/ASCO's parent corporation. During the course of the search, McNaughton, President of Bell Fuels, was interviewed in his office by an FBI agent and a Pennsylvania Revenue Enforcement Officer.

Sometime during the interview, McNaughton left his office to speak with Mr. Thomas Smida, an attorney who had arrived to represent Atlantic in connection with the execution of the search warrant. After conferring with Smida, McNaughton informed the agents that Smida did not want him to make any more statements. Later, Smida was present when an agent elicited background information from McNaughton. Smida, however, halted the interview when an agent asked McNaughton about his tax returns. Smida was also present when McNaughton's briefcase was searched.

On November 30, 1992, FBI Agent Sid Perry called McNaughton and invited him to the FBI office in Philadelphia to review the evidence against him. On December 1, 1992, McNaughton went to the FBI office, where he was interviewed by Agent Perry. During the course of the interview, McNaughton admitted (1) that he was involved in "daisy chain" deals, (2) that the price of oil purchased through the daisy chains was too low for taxes to have been paid, (3) that ASCA/NOVA was established in order to avoid BELL/ASCO's appearance at both ends of the chains, and (4) that he had received commission payments for his participation in the "daisy chain" scheme. At no time during the interview did McNaughton state that he was represented by Mr. Smida or any other counsel.

REASONS FOR GRANTING THE WRIT

I.

LEGAL BACKGROUND OF THE ISSUE

The issue raised in this petition is to what extent agents may have contact with and interview represented targets during the preaccusation stage of proceedings, and thus before the availability of the target's Sixth Amendment right to counsel.

The relevant case law may be described quite simply: On the one hand, in *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990), the court held that the ethical prohibitions on direct contact with represented persons applies before the filing of charges and that, under appropriate circumstances, suppression of such statements as may be taken during such contacts may be ordered. On the other hand, in *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990), the court concluded that, at least in the case of undercover contacts during which conversations are recorded, the prohibition of the ethical rules does not apply.

Rule IV entitled "Standards for Professional Conduct," promulgated as part of the local rules of civil procedure of the district court, specifically incorporate the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania. Rule 4.2 of the Rules of Professional Conduct, as adopted by the Supreme Court of Pennsylvania, entitled "Communication with Person Represented by Counsel," states that "[i]n representing a client, a lawyer should not communicate about the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, and that unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

II.

THE THIRD CIRCUIT'S ANALYSIS

The Third Circuit held that, (1) in order to prevail, McNaughton must demonstrate that the ethical rule applied to the case agent who interviewed him; (2) that the appellant was represented by counsel at the time of the interview, and (3) that suppression of the statement was the appropriate remedy for a violation of the ethical rule. The court determined that the district court did not err in its finding that the Petitioner was not

represented at the time of the interview, but rather that the lawyer in question represented the Petitioner's corporate employer. *Id.* Thus, the court did not decide whether the case agent was bound by Rule 4.2.

III.

THE ERROR IN THE THIRD CIRCUIT'S ANALYSIS

In the first instance, the Third Circuit declined to reverse what it characterized as the district court's factual finding that the Petitioner was not represented at the time of the interview and noted that McNaughton never suggested that the lawyer, Thomas Smida, Esquire, represented him in a personal capacity. It is submitted that the Third Circuit applied the wrong standard in determining whether McNaughton was represented by counsel and that, once McNaughton was represented, the agent could not contact him at all. McNaughton testified as follows as to his relationship with Smida:

> Q: Would you agree that Tom Smida was acting as your attorney?
>
> A: Yes

The record is unequivocal but that Smida operated as the Petitioner's lawyer in several regards and that this participation as a lawyer was acknowledged, understood and acquiesced in by the government personnel assigned to this case. Special Agent William Sinapole and Special Agent Ralph Hilborn, the two agents who testified as to the conduct of a search warrant and interrogation on November 24, 1993, both agreed that there came a time when Smida and other counsel arrived and consulted with Richard McNaughton. At that time, Petitioner requested to speak to the attorney, consulting with Smida at approximately 10:36 AM.

With the approval of the government, this Petitioner was permitted to consult with Smida for approximately 40 minutes.

Thereafter, Smida acted as a lawyer for Petitioner in at least several regards. First, the government agents requested that they be permitted to discuss certain general biographical information with Petitioner. While this request was the subject of some dispute, the disputes relate to matters somewhat wide of the mark in importance. It matters not who was asked for permission for the interview to take place, whether or not the lawyer was present at the request of the Petitioner, or whether the request was first made to Petitioner or Smida by the agents. Rather, the central unequivocal fact, agreed upon by the witnesses is that Smida advised Petitioner on the extent of his answers to the questions. In essence, Smida was functioning as a lawyer, as perceived by himself, Agent Hilborn, and Richard McNaughton. For example, Agent Hilborn testified on direct examination that he spoke with the attorney and asked the attorney if he would agree that the agents could ask biographical questions. The attorney was the intermediary, and was present during the interview.

Smida made clear that, upon his arrival, he consulted with Mr. McNaughton, as well as other executives at Atlantic and that he terminated the interview of McNaughton when the agents attempted to go beyond simple biographical data. In advance of the biographical interrogation, Smida said that the agents asked his permission to conduct the interview.

The assertion that Smida operated as personal counsel for the Petitioner is demonstrated beyond cavil by the government exhibit MC4, consisting of the interview outline used by the agents to conduct the "biographical interview." The handwritten notation on the bottom of the second page, at paragraph 12, states that "atty refused any further questions 11:48 AM."

Second, Smida operated as counsel in connection with Mr. McNaughton's request for release of certain personal items in his briefcase. Smida stated on direct examination that he negotiated the matter of the release of personal items while the agent would only say that Smida was "present" during the discussions. The participation in the release of personal items is clear, however, since it is unimaginable that an agent would expect that a lawyer for a party in a case should participate in discussions as a "witness."

Third, Smida participated as a lawyer in attempting to have Mr. McNaughton released or dismissed from the scene of the search. He testified that during the conduct of the search, he tried to get specific authorization from Special Agent Rammel, apparently the "gentleman in charge" of the search. Smida repeatedly asked Rammel about McNaughton's status and whether he could be "dismissed" only to, at least in his view, be ignored.

Finally, the Petitioner was represented by Smida in connection with the restraining order entered in a parallel RICO forfeiture case by Judge Harvey Bartle. Judge Bartle's order was served on the parties during the execution of the search warrant on November 24. That order makes clear that the assets of Bell and Atlantic were frozen and that the order specifically bound all officers and directors of both companies. In connection with that court order, Smida represented, among other people, the Petitioner, conducting negotiations with Assistant U.S. Attorneys on November 24, by telephone, and on Friday, November 27 during meetings in person. Specifically, he attempted to have an amendment to the order, by agreement, so that the Petitioner could be paid his salary.

In summary, Smida operated exactly as a lawyer would be expected to operate, representing Petitioner in connection with matters of some urgency — the criminal investigation and the civil action.

The principal basis for the Third Circuit's conclusion that McNaughton was not represented was a statement at the suppression hearing that Smida did not represent him personally as of that time. App. B at 8a. While it is true that McNaughton did testify as described, in context it was clear that he had been represented by Smida throughout the last week of November of 1992, but that Smida, because of conflict of interest concerns, advised him to take steps to retain his own counsel. McNaughton was, as he described it, in the process of arranging new counsel, when the government agent contacted him and invited him in for a discussion. It is submitted that for all purposes, Smida acted as McNaughton's lawyer in connection with all relevant government proceedings and the government agents knew this. Smida had cut off questioning several times before and yet the agents contacted McNaughton directly without the lawyer's knowledge.

It is this contact which violated Rule 4.2 and in its analysis of this contact that the Third Circuit erred in its legal analysis. The Third Circuit relied on McNaughton's statement that he did not consider himself represented, but it is clear that McNaughton believed that the conflict of interest problem raised by Smida somehow changed their relationship. It is submitted that the agents knew of the attorney-client relationship and that under Rule 4.2 they cannot communicate at all with the client without the permission of counsel. McNaughton's lay misunderstanding of the impact of conflict of interest rules (*ie.*, his belief that Smida no longer represented him because of the instruction to seek other counsel) was taken advantage of by the government in an improper way.

Put another way, Smida remained McNaughton's counsel and was discharging his ethical obligation by getting new counsel in the picture and that the government should have contacted McNaughton through Smida until such time as new counsel was involved.

IV.

WHY THE WRIT SHOULD BE GRANTED

The systemic importance of the overall issue raised here — the application of the Rules of Ethics during the preaccusation stage of proceedings — is manifest. Here, however, the Third Circuit's decision which seemed to turn on its simple conclusion that the district court's factual finding that McNaughton was not personally represented by Smida was not clearly erroneous. Under IOP9.3.2, this would seem an inapt case for *in banc* review, at least at first examination.

It is submitted that both the district court and the Third Circuit applied an incorrect legal standard searching for a showing of a formal attorney-client relationship between McNaughton in his personal capacity and Smida. It is submitted that Smida, by whatever rubric one would apply to the relationship, represented McNaughton personally on the fundamental question of whether he would be interviewed by federal agents. While one may argue that corporate counsel might have an interest in the statements made by a corporate officer, Smida acted as a lawyer for McNaughton in a purely personal sense by negotiating for the return of his personal belongings and his briefcase and for his right to leave the premises. The personal nature of the representation was also clear to the federal agents who, after questions was cut off several times by Smida, circumvented Smida's representation and contacted the client directly. Finally, the Third Circuit's reliance upon McNaughton's statement that he did not believe he was represented when he spoke with Special Agent Perry is also legally misplaced since Rule 4.2 permits contact with the client only with the permission of the lawyer. Smida was simply acting honorably and ethically in addressing the conflict of interest implications of his joint representation and it is particularly important that during such a period, adverse parties not place themselves in the position

of dealing with a lay client who might believe, however erroneously, that the fact of a potential conflict rendered him unrepresented. Thus, it is Rule 4.2 which was misinterpreted by the Third Circuit.

It is submitted that the issue is one of systemic importance to the administration of justice for several reasons. First, the proliferation of complex cases which necessarily involve a long investigative period during which subjects may be represented provides many opportunities for the issue to arise. Second, the use of complex investigative techniques such as undercover activities, search warrants, and electronic surveillance render it all the more likely that government agents will have contact with represented persons. Finally, there is a relative lack of clear authority on the question and yet it is important that clarity be established so that agents know how to conduct themselves in this regard.

CONCLUSION

For the reasons stated above, it is respectfully requested that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2079

UNITED STATES OF AMERICA

v.

RICHARD McNAUGHTON

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SAROKIN, *Circuit Judges*

The petition for rehearing filed by Appellant Richard McNaughton in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ D.K. Sloviter
Chief Judge

Dated: SEP 07 1995

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 9, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1982

UNITED STATES OF AMERICA

v.

IGOR VEKSLER,

Appellant

No. 94-2079

UNITED STATES OF AMERICA

v.

RICHARD MCNAUGHTON,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 93-cr-00147-8, 93-cr-00147-10)

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 21, 1995

Before: SLOVITER, *Chief Judge*,
SCIRICA and McKEE, *Circuit Judges*

(Filed: August 9, 1995)

Appendix B

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Appendix B

OPINION OF THE COURT

SLOVITER, *Chief Judge*.

Richard McNaughton and Igor Veksler appeal from the judgments of conviction and sentences entered against them by the district court. For the reasons set forth below, we will affirm the district court's orders.

I.

Facts and Procedural History

During 1991 and 1992, McNaughton and Veksler were involved in a scheme to evade federal and state taxes on sales of number two oil, a product that can be used as either home heating oil or diesel fuel. During this period, no taxes were imposed by the federal government or either New Jersey or Pennsylvania on the sale of number two oil for use as home heating oil. In contrast, the United States, New Jersey and Pennsylvania did tax the sale of number two oil when it was to be used as diesel fuel, and imposed that tax on the producer or importer who first sold the oil to a purchaser that did not hold a Registration for Tax-Free Transactions (IRS Form 637).

The tax evasion scheme in which McNaughton and Veksler participated involved the use of "daisy chains," a series of paper transactions through numerous companies, some of which were largely fictitious. In each "daisy chain," the change in characterization of number two oil from tax-free home heating oil to taxable diesel fuel was effected through the use of a "burn company," which would purchase number two oil as tax-free home heating oil and then sell it to another company as diesel

fuel. The burn company, which typically held an IRS Form 637, would produce invoices to its purchaser reflecting that the diesel fuel taxes had been paid and that the taxes were included in the price. Although the burn company was liable for the payment of taxes on the oil, it paid no taxes and typically existed for a brief time and then disappeared. The participants in the scheme took commissions on the sales at the step in which each participated.

On September 19, 1993, the United States filed a superseding indictment charging eighteen different defendants with various offenses related to the "daisy chain" operation. Both McNaughton and Veksler were charged with one count of conspiracy. McNaughton was also charged with twenty-three counts of wire fraud, three counts of attempted tax evasion, and RICO conspiracy.[1] In addition to the conspiracy count, Veksler was charged with six counts of wire fraud and one count of attempted tax evasion.

On May 23, 1994, after a twenty-day trial, the jury convicted McNaughton on all counts. Veksler was convicted of the conspiracy and wire fraud counts and acquitted on the tax evasion counts. McNaughton was sentenced to a prison term of forty months, five years of supervised release, and a special assessment of $1,400.00. Veksler was sentenced to a prison term of twenty-six months, followed by three years of supervised release. These appeals followed.

---

1. A RICO forfeiture count under 18 U.S.C. § 1963(m) was also brought against McNaughton.

Appendix B

II.

Discussion

A. *Appeal No. 94-2079—McNaughton*

McNaughton was the president of BELL/ASCO, a Pennsylvania corporation that was in the business of making purchases and sales of number two oil. Prior to April 1, 1992, BELL/ASCO allegedly played a dual role in the "daisy chain" scheme by both supplying number two oil to the chain and buying oil at the end of the chain. After April 1, 1992, BELL/ASCO served only as a supplier and a new company, ASCA/NOVA, purchased oil at the end of the chain. ASCA/NOVA, however, operated from the same office as BELL/ASCO.

1. *Did the district court err in refusing to suppress McNaughton's statement to Perry on December 1, 1992?*

On November 24, 1992, the government executed a search warrant at Atlantic Heating and Oil, BELL/ASCO's parent corporation. During the course of the search, McNaughton was interviewed in his office by an FBI Agent and a Pennsylvania Revenue Enforcement Officer. Sometime during the interview, McNaughton left his office to speak with Mr. Thomas Smida, an attorney who had arrived to represent Atlantic in connection with the execution of the search warrant. After conferring with Smida, McNaughton informed the agents that Smida did not want him to make any more statements. Later, Smida was present when an agent elicited background information from McNaughton. Smida, however, halted the interview when an agent asked McNaughton about his tax returns. Smida was also present when McNaughton's briefcase was searched.

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On November 30, 1992, FBI Agent Sid Perry called McNaughton and invited him to the FBI office in Philadelphia to review the evidence against him. On December 1, 1992, McNaughton went to the FBI office, where he was interviewed by Agent Perry. During the course of the interview, McNaughton admitted (1) that he was involved in "daisy chain" deals, (2) that the price of oil purchased through the "daisy chains" was too low for taxes to have been paid, (3) that ASCA/NOVA was established in order to avoid BELL/ASCO's appearance at both ends of the chains, and (4) that he had received commission payments for his participation in the "daisy chain" scheme. At no time during the interview did McNaughton state that he was represented by Mr. Smida or any other counsel.

McNaughton contends that because he was represented by Smida at the time of Agent Perry's questioning, the district court erred by refusing to suppress his statement. McNaughton argues that Perry violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct by questioning him,[2] and that suppression is the appropriate sanction.

Rule 4.2 of the Pennsylvania Rules of Professional Conduct provides, in relevant part, that:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

---

2. The Pennsylvania Rules of Professional Conduct are applicable to all actions before the United States District Court for the Eastern District of Pennsylvania. *See* Rule 14.IV(B) of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania.

Appendix B

Pa. R.P.C. 4.2. As the district court concluded, in order for McNaughton to prevail on his motion to suppress the court would have to find (1) that the Rule applied to Agent Perry, although he is not an attorney, (2) that McNaughton was represented by counsel when Perry interviewed him on December 1, 1992, or that McNaughton is otherwise entitled to protection under the Rule, and (3) that suppression of the statement is an appropriate remedy for a violation of the Rule.

The district court concluded that McNaughton was not represented by counsel at the time of the interview. There is adequate support in the record for this conclusion. During the execution of the search warrant at Atlantic, Smida represented himself as the "company" attorney, and never suggested that he represented McNaughton. App. at 722. McNaughton also referred to Smida as his employer's attorney, and never suggested that Smida represented him in a personal capacity. App at 723. In addition, on November 25 or 26, 1992, Atlantic informed McNaughton that it would not represent him in connection with this matter and that he should retain personal counsel. App. at 722. Indeed, at the conclusion of the December 1, 1992, interview, McNaughton suggested to Perry that he might retain an attorney and asked for Perry's opinion of two possible candidates. App. at 725. Finally, and most significantly, McNaughton testified at the suppression hearing that Smida was not representing him personally at the time of the December 1, 1992, interview. App. at 2869-70. In light of these facts, we cannot characterize the district court's conclusion that McNaughton was not represented at the time of the interview as clearly erroneous. Thus, McNaughton may not invoke the protections of Rule 4.2.

Nor does McNaughton have standing to invoke Rule 4.2 on Atlantic's behalf. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133-

34 (1978); *United States v. Fortna*, 796 F.2d 724, 732-34 (5th Cir.) (defendant lacks standing to assert violation of a third-party's attorney-client privilege), *cert. denied*, 479 U.S. 950 (1986). Although Rule 4.2 applies to communication with persons having managerial responsibility on behalf of a represented organization, *see* Pa. R.P.C. 4.2 (Comment), we need not decide whether Perry's questioning of McNaughton violated Rule 4.2 as it applies to Atlantic, because McNaughton could not invoke any such violation as a basis for his suppression motion.

It follows that the district court did not err in denying McNaughton's motion to suppress his statements to Perry on December 1, 1992.[3]

2. *Did the district court err in denying McNaughton's motion to suppress the wiretap information?*

McNaughton contends that the district court erred by refusing to suppress the wiretap information in this case because the warrant for those wiretaps was granted on the basis of information obtained through the use of a pen register. While McNaughton acknowledges that the United States Supreme Court upheld the use of pen registers without a warrant in *Smith v. Maryland*, 442 U.S. 735 (1979), he contends that the *Smith* decision was based upon the fact that pen registers were incapable of intercepting conversations. McNaughton argues that modern technological advances, which have permitted the development of pen registers that can be turned into listening devices with the mere turn of a switch, merit reconsideration of the Supreme Court's position. At a minimum, he reasons, he

3. Because we find that McNaughton was neither represented at the time of the interview nor otherwise entitled to the protections of Rule 4.2, we need not address whether suppression is the appropriate remedy for a violation of Rule 4.2.

should be permitted to conduct discovery regarding the use of the pen register and the government policies regarding such use.

We would not be so presumptuous as to limit *Smith*, a Supreme Court decision, in the manner suggested by McNaughton. In any event, McNaughton concedes that he has no evidence that the pen register was used to record any information other than telephone numbers. The mere suggestion that pen register equipment is now capable of misuse does not give us a basis to depart from the controlling precedent of the *Smith* case. The district court therefore did not err in failing to suppress the wiretap and in concluding that McNaughton is not entitled to additional discovery on that issue.

3. *Did the district court err in declining to order the government to disclose information regarding Hurchalla's status as a subject of a grand jury investigation?*

McNaughton filed a post-trial motion for information on the status of a grand jury investigation in connection with Charles Hurchalla, one of the government's trial witnesses, at the time that Hurchalla began to cooperate with the government. McNaughton suggests that by failing to disclose this information the government may have violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *Giglio v. United States*, 405 U.S. 150, 153-55 (1972). The district court denied McNaughton's request, holding that the outcome of the trial would not have been different if the government had disclosed the requested information. App. at 263-64.

McNaughton asserts that the grand jury investigation conducted by the Office of the Inspector General of the

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Department of Transportation concerned possible fraud and false statements in connection with minority set-aside programs. The only possible relevance of this information, sought at this late date, would be in support of a motion for a new trial. In order to establish a *Brady* violation, a defendant must first demonstrate that the prosecution failed to disclose pro-defense evidence "actually or constructively in its possession or accessible to it." *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991).

McNaughton does not suggest that the prosecution had actual knowledge or cause to know of the ongoing nature of the investigation of Hurchalla. All criminal history checks of Hurchalla were negative and Hurchalla himself told the prosecution that the investigation had occurred in the 1980s. Constructive knowledge can only be found where the defense has made a specific request for the information. *See United States v. Joseph*, 996 F.2d 36, 40-41 (3d Cir.), *cert. denied*, 114 S.Ct. 357 (1993). The defense made no such request prior to trial, even though it had information regarding the existence of the investigation. Under these circumstances, we cannot conclude that the prosecution committed a *Brady* violation. *Id.* at 41.

Moreover, not every failure to disclose evidence favorable to the defense requires a reversal of a conviction. *See United States v. Thornton*, 1 F.3d 149, 158 (3d Cir.), *cert. denied*, 114 S.Ct. 483 (1993). Rather, the undisclosed evidence must also be material. *Id.* " '[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' " *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Opinion of Blackmun, J.)).

McNaughton contends that the undisclosed evidence could have led the jury to conclude that Hurchalla's testimony was designed to further his own interests in connection with the ongoing grand jury investigation. As the government notes, inasmuch as Hurchalla was unaware of the ongoing nature of the investigation and Hurchalla never asked the government to intercede on his behalf in connection with any such investigation, it is unlikely that the jury would have rejected Hurchalla's testimony on the basis of evidence regarding the ongoing grand jury investigation.

We note also, as the district court concluded, that the extensive evidence regarding BELL/ASCO's involvement in the "daisy chain" scheme provided ample evidence of McNaughton's guilt. App. at 1616-22, 1634. There was testimony by Nadezhda Shnayderman that McNaughton received commissions for his participation in the scheme. App. at 1204-05.

We therefore conclude that the district court did not err in refusing to allow McNaughton to conduct further discovery into the status of the grand jury investigation.

4. *Did the district court err in imposing McNaughton's sentence?*

McNaughton raises various challenges to the district court's application of the sentencing guidelines. We exercise plenary review over legal questions about the meaning of the sentencing guidelines, but apply the deferential clearly erroneous standard to factual determinations underlying their application. *See United States v. Collado*, 975 F.2d 985, 990 (3d Cir. 1992).

First, we find no error in the district court's imposition of a two-level upward adjustment under U.S.S.G. § 2T1.1(b)(2) for

McNaughton's use of "sophisticated means" to impede discovery of the tax offense. Application note 4 to section 2T1.1 states that " 'sophisticated means' ... includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case." U.S.S.G. § 2T1.1, comment. (n.4). The commentary continues by stating that "[a]n enhancement would be applied, for example, where the defendant used ... transactions through corporate shells or fictitious entities." *Id.* The "daisy chain" scheme employed by McNaughton in this case is plainly covered by this language.[4]

Nor did the district court abuse its discretion in declining to grant a two-level reduction under U.S.S.G. § 3E1.1 for McNaughton's acceptance of responsibility. Although McNaughton made significant admissions to investigating officers during the execution of the search warrant and to Agent Perry during the December 1, 1992 interview, the record does not support the conclusion that he admitted that he personally had committed the crimes charged in the indictment. Moreover, as application note 2 of section 3E1.1 suggests, in most cases, "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt ...." U.S.S.G. § 3E1.1, comment. (n.2).

At sentencing McNaughton sought a downward departure under U.S.S.G. § 5H1.4 due to his medical condition, in that his lung function was seriously decreased. From our review of the

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4. McNaughton contends that the use of a "sophisticated means" enhancement is duplicative and improper where the state and federal tax losses were combined to calculate the offense level under the Tax Table at U.S.S.G. § 2T4.1. The imposition of a "sophisticated means" enhancement under § 2T1.1(b) is unrelated to the calculation of the base offense level from the tax loss under § 2T1.1(a).

record, we conclude that the district court's refusal to depart was based not on a belief regarding its authority to depart, as McNaughton argues, but on McNaughton's failure to present evidence sufficient to warrant an exercise of the court's discretion under section 5H1.4. The district court's refusal to exercise its discretion to grant a downward departure pursuant to section 5H1.4 is therefore not subject to review by this court. *See United States v. Gaskill*, 991 F.2d 82, 84 (3d Cir. 1993).

B. *Appeal No. 94-1982 — Veksler*

Veksler was the operator of one of the "daisy chain" participants, I.V. Enterprises, a Wisconsin corporation that held an IRS Form 637, a Pennsylvania oil company franchise tax exemption certificate and a New Jersey Special B license. Between July 1991 and December 1991, I.V. purchased approximately 3,486,000 gallons of number two oil from Self Oil and sold it, on paper, to Keroscene, Inc., which served as a burn company in the same "daisy chain." I.V. never received payment for the oil from Keroscene, however, Instead, I.V. received wire transfers from companies to which Keroscene sold the oil.

1. *Was there sufficient evidence to support the jury's guilty verdict on Counts 1-7?*

Veksler argues that the government failed to present evidence sufficient to support his wire fraud and conspiracy convictions. In particular, Veksler contends that the government failed to present evidence to support the conclusion that Veksler had the requisite level of intent to support his convictions under 18 U.S.C. § 1343 (wire fraud) and 18 U.S.C. § 371 (conspiracy).

A "claim of insufficiency of the evidence places a very heavy burden on an appellant." *United States v. Gonzalez*, 918

F.2d 1129, 1132 (3d Cir. 1990) (quotation and citation omitted), *cert. denied*, 498 U.S. 1107 (1991), *cert. denied*, 499 U.S. 968 (1991), *cert. denied*, 499 U.S. 982 (1991). In evaluating the sufficiency of the evidence to sustain a conviction the evidence at trial is considered in the light most favorable to the government. The " 'evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt'." *United States v. Sandini*, 888 F.2d 300, 311 (3d Cir. 1989) (quoting *United States v. Cooper*, 567 F.2d 252, 254 (3d Cir. 1977)), *cert. denied*, 494 U.S. 1089 (1990). Instead, this Court reviews the evidence to determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In order to convict a defendant of wire fraud under 18 U.S.C. § 1343, the government must prove, *inter alia*, that the defendant participated in the scheme with the specific intent to defraud. *In Re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236, 1249 (3d Cir. 1989). In order to convict a defendant of conspiracy to defraud the United States under 18 U.S.C. § 371, the government must prove, *inter alia*, that the defendant intended to defraud the United States. While the parties appear to disagree on whether section 371 requires a showing of "willfulness" on the part of the defendant, they do agree that in order to demonstrate the requisite intent to support Veksler's convictions, the government must demonstrate both (1) that Veksler knew of the obligation to pay taxes on the oil sold as diesel fuel and (2) that he knew that the purpose and effect of his actions was to avoid the payment of such taxes. *See* Appellant's Brief at 15; Appellee's Brief at 38-39.

A review of the record in this case demonstrates that the government satisfied its burden of presenting sufficient evidence

upon which a jury could have based its conviction. Dimitry Belokopytov, Veksler's associate at I.V. Enterprises, testified that he instructed Veksler to send form letters regarding meetings that never occurred to other participants in the daisy chain scheme. App. at 839-41. Belokopytov also instructed Veksler to send invoices to Keroscene. The payments to I.V., however, were all made by Romans Penn. These facts are sufficient to permit the jury to infer that Veksler was aware that his company was not engaged in legitimate business activities. Moreover, Belokopytov also explained to Veksler that it was "very important" that I.V.'s papers demonstrate that it bought only heating oil and not diesel fuel because heating oil was not taxed, while diesel fuel was taxed. App. at 828-29. This testimony was sufficient to permit the jury to infer that Veksler knew about both the tax obligations regarding the sale of diesel fuel and the tax evasion goals of the scheme in which he participated.[5] We thus reject Veksler's contention that there was insufficient evidence of his specific intent.[6]

2. *Did the court err in refusing to depart from the sentencing guidelines due to Veksler's degree of culpability?*

Veksler also argues that the district court erred in refusing to depart from the base offense level applicable to him under the

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5. This case is therefore distinguishable from *United States v. Pearlstein*, 576 F.2d 531, 543 (3d Cir. 1978), where the government presented no substantial evidence from which the jury could infer that the defendants were, or should have been, aware of the fraudulent nature of the scheme.

6. Because we conclude that the government presented adequate evidence to support Veksler's convictions, we need not address the issue of whether district court's reliance upon Veksler's testimony as an alternative basis for supporting the convictions was proper.

Sentencing Guidelines. Under U.S.S.G. § 2T1.1, the base offense level for offenses involving taxation is determined by the amount of the tax loss. In this case, the district court based its calculation of Veksler's offense level on the approximately $1.4 million in tax losses that could be attributed to transactions in which Veksler participated. *See* U.S.S.G. §§ 2T1.1(a), 2T4.1.

At sentencing, Veksler requested the district court to depart from this base offense level because it overstated his culpability and because the amount of taxes lost was not foreseeable by Veksler under the evidence adduced at trial. The district court rejected Veksler's request, and Veksler reads the court's statement as holding that it lacked the authority under the Guidelines to grant the requested departure. We need not decide whether the district court had authority to grant the requested departure because the court found as a fact that the tax loss was foreseeable to Veksler who "participated in a very integral part of this entire daisy chain." App. at 338.

Moreover, nothing in section 2T1.1 and its accompanying application notes suggests that a court has the discretion to depart from the base offense level established through calculation of the tax loss. This case differs significantly from those cited by Veksler. In *United States v. Monaco*, 23 F.2d 793 (3d Cir. 1994), the commentary to the guideline at issue expressly permitted a downward departure in certain limited circumstances. *Id.* at 798-99. As Veksler points out, in *United States v. Stuart*, 22 F.3d 76 (3d Cir. 1994), we suggested that in certain instances, a court may have the authority to depart even in the absence of explicit authorization, but that decision was limited to instances where " 'a particular guideline linguistically applies but . . . the conduct [of a defendant] significantly differs from the norm.' " *Id.* at 82-83 (quoting *United States Sentencing Commission Guidelines Manual* 5-6 (1992)).

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Veksler has presented no arguable basis for applying the exception identified by this court in *Stuart*. Section 2T1.1 patently applies to Veksler, and the facts of this case lack any extraordinary circumstances that the Sentencing Commission would not have considered in formulating the guideline. *See Stuart*, 22 F.3d at 82. Thus, we find no error in the district court's refusal to grant the departure requested by Veksler.

III.

Conclusion

For the foregoing reasons, we will affirm the judgments of conviction and the sentences imposed by the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED APRIL 6, 1994

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

NO. 93-147(-10)

UNITED STATES OF AMERICA

v.

RICHARD MCNAUGHTON

Anita B. Brody, J April 4, 1994

MEMORANDUM AND ORDER

Richard McNaughton is one of eighteen defendants named in a ninety-seven count indictment that alleges the existence of a conspiracy to evade state and federal excise taxes on the sale of diesel oil. The issue before me is whether to suppress statements McNaughton made to federal agents during interviews on November 24, and December 1, 1992. In arriving at my decision I must decide:

1. Whether a suspect is "in custody" when he is interviewed alone by government agents but is not handcuffed, patted down, placed under arrest, or otherwise physically restrained, and is permitted to receive telephone calls and to leave to speak with an attorney when he asks to do so. I hold that he is not.

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2. Whether statements made in response to a government agent's invitation to cooperate, but in the absence of any promises of leniency or confidentiality, are inadmissible as involuntary. I hold that such statements are voluntary and admissible.

3. Whether statements made in response to an agent's invitation to cooperate, but in the absence of any promises or discussions of reduced charges or specific sentences, are inadmissible as having been made in the course of plea negotiations. I hold that such statements are not suppressible on that basis.

4. Whether a defendant, who in his capacity as a corporate officer was represented by the company's corporate attorney, may obtain suppression of statements he made to a government agent who spoke to the defendant himself rather than to the company's attorney. I hold that the statements should not be suppressed. In deciding this I must determine:

(a) if a government agent is subject to the anti-communication rule to the same extent as the government's attorney. I find that he is.

(b) if representation by the corporate attorney is representation of the defendant in his individual capacity. I find that it is not.

(c) if a defendant is entitled to invoke the protection of the anti-communication rule in this circumstance. I find that he is not.

(d) if I were to find that the attorney-client relationship had been violated, whether suppression is an

appropriate remedy for an ethics violation. I find that it is not.

FINDINGS OF FACT

As to statements made November 24, 1992:

1. Defendant McNaughton is the Manager of Wholesale Fuel Sales for Atlantic Oil and Heat ("Atlantic") and the president of Bell Fuels, Inc., trading as ASCO, Inc. McNaughton holds no ownership interest in either company.

2. On November 24, 1992, a search warrant was executed at the offices of Atlantic, located in Macungie, Pennsylvania. The search began at approximately 9:00 a.m. and continued until approximately 7:00 p.m.

3. Two agents, FBI Agent William Sinopole and IRS Agent William Ranmal, entered the offices of Atlantic through the main entrance at approximately 9:00 a.m. Agent Sinopole announced in a loud voice that everyone was to stop work and leave their work stations, that the agents were there to execute a search warrant and that the employees were free to stay or go, as long as they did not work or interfere with the search, but that the agents wanted to identify people before they left. After this announcement the remaining agents entered the building.

4. Nineteen agents of the Federal Bureau of Investigation ("FBI), Internal Revenue Service ("IRS") and Pennsylvania Department of Revenue, Bureau of Motor Fuel Taxes conducted the search. They were assisted later in the day by five additional IRS agents. The agents were armed and were wearing "raid" jackets (nylon windbreaker jackets saying FBI, CID or POLICE

across the back). The agents did not draw their guns at any time during the search.

5. Approximately twenty-eight employees of Atlantic, including McNaughton, were on the premises when the search of Atlantic began.

6. McNaughton was interviewed by FBI Agent Ralph Hilborn and John Brennan, a Pennsylvania Revenue Enforcement Officer, in his office during the execution of the search warrant. McNaughton was not placed under arrest, patted down, handcuffed, or otherwise physically restrained. McNaughton was free to leave at all times.

7. Agent Hilborn advised McNaughton that the agents were there to execute a search warrant, told him what records they were searching for, and asked for his cooperation in locating any records within his office.

8. Agent Hilborn also explained to McNaughton that there was a significant amount of evidence against him, that it was likely that he was going to be prosecuted, that cooperation can be considered by the court at the time of sentencing under the Sentencing Guidelines, asked for his cooperation, and asked to interview him. He did not advise McNaughton of his *Miranda* rights.

9. Richard McNaughton agreed to be interviewed on November 24, 1992. The interview lasted from approximately 9:05 a.m. to 10:36 a.m.

10. At some point during the interview Agent Hilborn or Agent Brennan pushed the door of McNaughton's office closed

or nearly closed; the agent took no action to lock the door. When shut, the door automatically locked so that no one could enter the office, although people in the office could still leave.

11. Agent Hilborn did not tell McNaughton that the interview would be "off the record", nor did he made any promises to Richard McNaughton regarding charges or sentencing. In fact, Hilborn specifically told McNaughton that he was not authorized to make promises of any kind to him.

12. Hilborn and McNaughton did not discuss the possibility of a guilty plea.

13. During the interview, McNaughton did not try to use the telephone to make any calls, nor did he ask the agents if he could do so. McNaughton received several calls during the interview. The agents asked some of the callers to call back at a later time; McNaughton spoke to other callers.

14. During the interview Agent Hilborn told McNaughton that Agent Perry would also like to interview him and would be getting in touch with him.

15. Attorney Thomas Smida is associated with the firm of Weaver, Mosebach, Piosa, Hixson & Marles of Allentown, Pennsylvania, and has experience in the area of criminal tax law. Attorney Smida received a telephone call on November 24, 1992 from Attorney Hauff, corporate counsel for Atlantic and Bell/ Asco, and thereafter came to the offices of Atlantic, arriving at approximately 10:30 a.m.

16. Upon his arrival at Atlantic, Attorney Smida met with Bruce Ebert, one of the owners of Atlantic; Ebert asked Smida to

represent the company and Ebert in connection with the execution of the search warrant that day.

17. McNaughton left the agents in his office at approximately 10:36 a.m. to speak with Attorney Smida. He was not restrained from leaving in any way. This was the first time that McNaughton had expressed to the agents any desire to leave his office.

18. McNaughton returned to his office at approximately 11:17 a.m. and told the agents that Attorney Smida did not want him to make any more statements. When questioned by Agent Hilborn regarding the status of Attorney Smida, Richard McNaughton stated, "I work for Bruce Ebert. His attorney told me not to give a statement." The agents did not question McNaughton again that day without Smida present.

19. Attorney Smida was present from 11:40 a.m. to 11:47 a.m. when Agent Hilborn elicited personal background information from McNaughton. Attorney Smida stopped the interview when Revenue Enforcement Agent John Brennan asked about McNaughton's tax returns.

20. Attorney Smida was also present from 12:05 p.m. to 12:20 p.m. when McNaughton's briefcase was searched. At that time McNaughton discussed with the agents which personal items he would keep from his briefcase.

21. When Agent Hilborn spoke with Attorney Smida, Smida indicated that he was the "company" attorney. He did not tell the agents that he represented Richard McNaughton.

22. At no time on November 24, 1992 did McNaughton ever say to the agents that Attorney Smida represented him personally.

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23. McNaughton left the offices of Atlantic in the early afternoon. As McNaughton was leaving the offices of Atlantic, Agent Hilborn shook his hand, reminded him that Agent Perry wanted to interview him and stated, "We'll be in touch".

24. At the conclusion of the search on November 24, 1992, the agents served Atlantic with a Temporary Restraining Order which froze the assets of Atlantic and Bell/Asco. McNaughton was not a party named in this Order.

25. Agent Hilborn told Agent Sid Perry about his contact with McNaughton the evening of November 24, 1994. He also told Agent Perry about Attorney Smida's involvement.

As to statements made December 1, 1992

26. On November 25 or 26, 1992, McNaughton was advised by the attorneys for Atlantic that they could not represent him and that he should obtain personal counsel.

27. On November 30, 1992, FBI Agent Sidney Perry called McNaughton on the telephone and invited him to the FBI office in Philadelphia to review the evidence against him, specifically a videotape and audiotapes. Perry told McNaughton that if he chose to come to the FBI office he would be free to leave and would not be arrested.

28. McNaughton went to the FBI office in Philadelphia on December 1, 1992, and went with Agent Perry to an IRS conference room in the same building. An audiotape and a videotape were played for him. Afterwards McNaughton agreed to be interviewed, and was interviewed by Agent Perry in the IRS conference room for approximately one and one-half hours.

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29. McNaughton was not advised of his Miranda rights on December 1, 1992. Agent Perry did not tell McNaughton that the interview on December 1, 1992 would be "off the record". Agent Perry gave McNaughton an explanation of the types of charges that could be brought against him, the accompanying penalties under the Sentencing Guidelines and the possible impact of cooperation on sentencing. Agent Perry did not make any promises to McNaughton, and did not discuss dropping or declining to bring charges against him.

30. McNaughton was not placed under arrest on December 1, 1992. He was not patted down, handcuffed, or otherwise physically restrained and was told that he was free to leave at all times. McNaughton admitted that he understood that he was free to leave at all times.

31. McNaughton did not tell Agent Perry on December 1, 1992 that he was represented by Attorney Smida or any other attorney, nor did he indicate that he wished to speak with an attorney.

32. After the interview ended, McNaughton pulled a sheet of paper from his pocket which contained the names of two attorneys, asked for Agent Perry's opinion of these attorneys and indicated that he might want to retain an attorney.

33. At some point after December 1, 1992, McNaughton retained attorney Robert Welsh to represent him in this matter.

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CONCLUSIONS OF LAW

As to both sets of statements

1. The manner in which the agents questioned McNaughton on November 24, 1992 and December 1, 1992 did not violate his rights under *Miranda v. Arizona* and its progeny

Law enforcement personnel are required to give *Miranda* warnings only where there has been such a restriction on a person's freedom as to render him "in custody." *California v. Beheler,* 463 U.S. 1121, 1124 (1983). The presence of armed agents, while undoubtably frightening, is not enough to create a custodial situation. *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977) (holding that *Miranda* warnings need not proceed questioning in a "coercive environment" if there is no restraint). When a person has not been arrested, a finding of "custody" requires some indication that the officers would not have heeded that person's request to depart. *Patterson v. Cuyler,* 729 F.2d 925, 929 (3d Cir. 1984).

I conclude that Mr. McNaughton was not "in custody" on either November 24 or December 1, 1992, and therefore not entitled to *Miranda* warnings. Mr. McNaughton was not hand cuffed, patted down, placed under arrest, nor told he could not leave on either occasion. He was permitted to receive telephone calls and to leave to speak with Attorney Smida when he asked to do so on November 24.

Mr. McNaughton concedes that he understood that he was free to leave during his interview with Agent Perry on December 1, 1992. He also argues, however, that the government violated

his rights under *Miranda* and *Edwards v. Arizona* 451 U.S. 477 (1981), when Agent Perry re-initiated the questioning of McNaughton after he had invoked his Fifth Amendment right to have counsel present during questioning. Under *Edwards*, once a suspect invokes his right under *Miranda* to have a lawyer present during questioning, there can be no further questioning without an attorney unless the suspect initiates it. *Edwards*, 451 U.S. at 484-85.

The protections of *Miranda* and *Edwards*, however, only apply to custodial interrogation. *See Arizona v. Roberson*, 486 U.S. 675, 685 (1988) (the Fifth Amendment right to counsel during custodial interrogation is meant to protect an accused against "the inherent pressures of custodial interrogation"); *Edwards*, 451 U.S. at 482 ("*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation."). Because I have held that McNaughton was not subjected to custodial interrogation on either November 24 or December 1, 1992, I also hold that Agent Perry did not violate the Fifth Amendment by contacting McNaughton for further questioning after he had once refused to answer questions without a lawyer present.

2. McNaughton's statements on November 24 and December 1, 1992 were made voluntarily

Where interrogation is noncustodial, to determine the voluntariness of a confession I must consider the effect that the totality of the circumstances had upon the will of the defendant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973). The issue is whether the defendant's will was overborne when he made incriminating statements. *Id.* at 225-26. The factors to be considered include

> the youth of the accused; his lack of education or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as deprivation of food or sleep.

Id. at 226.

Although a statement by an agent that cooperation will be brought to the attention of prosecuting authorities does not automatically render a confession involuntary, *United States v. Fraction*, 795 F.2d 12 (3d Cir. 1986), there are times when promises of leniency or confidentiality made by a law enforcement officer can justify a finding that the defendant's will was overborne and any statement made as a result of those promises was involuntary. *U.S. v. Walton*, 10 F.3d 1024, 1028-29 (3d Cir. 1993). McNaughton argues that suppression of his statements is justified under *Walton*.

In *Walton*, the defendant met with two agents in a park. One of the agents, who had been a high school classmate of the defendant, told him that he could speak "off the cuff". The agent testified at trial that he *did* mean to say that the defendant's statements would not be used against him, and that he did not think differently until a supervisor told him they would use the statements despite his promise. The Third Circuit held that, given the casual setting of the conversation, the prior relationship between the defendant and the agent and the fact that the agent referred to that relationship, and the fact that, at the time of the conversation, the defendant didn't know that he was the subject of an investigation, the defendant was deprived of the ability to

make an intelligent choice between exercising and waiving his privilege to remain silent. *Walton*, at 1030.

The facts here are very different. The agents who interviewed McNaughton did not promise that anything would be "off the record"; they did explain the potential benefits of cooperation in terms of sentencing, but did not make any promises to McNaughton about what charges would be brought against him or what sentence he would receive. Moreover, none of the factors that the Third Circuit found significant in *Walton* are present here: McNaughton knew that he was a target of the government's investigation and there was no personal relationship or casual situation to lull McNaughton into believing that this was anything but a formal investigatory interview.

Neither do the *Schneckloth* factors support a finding that McNaughton's statements were involuntary. Mr. McNaughton is a mature adult of professional background, who was not subjected to prolonged detention, verbal harassment, or physical discomfort. I find that his will was not overborne by any statements or conduct of government agents on November 24 or December 1, 1992.

3. McNaughton's statements on November 24 and December 1, 1992 were not made during the course of plea negotiations

The current version of Rule 11(e)(6)(D) of the Federal Rules of Criminal Procedure provides, in pertinent part, that:

> Except as otherwise provided in this paragraph, evidence of the following is not . . . admissible against the defendant who

> made the plea or was a participant in the plea discussions . . .
>
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Fed. R. Crim. P. 11(e)(6).[1]

This rule was amended in 1979 in order to narrow the scope of the evidentiary exclusion, which used to cover all "statements made in connection with, and relevant to, any of the foregoing pleas or offers". *See United States v. Sebetich*, 776 F.2d 412, 421 (3d Cir. 1985) (reviewing legislative history of the amendment), *cert. denied*, 484 U.S. 1017 (1988).

In *Sebetich*, the Third Circuit upheld the admission of statements the defendant had sought to characterize as plea negotiations because 1) neither the defendant nor the government agent intended to reach a plea agreement during the discussions; 2) the defendant could not reasonably have believed that the agent had authority to plea bargain; and 3) the statements were not made to an attorney for the government. *Sebetich*, 776 F.2d at 421-22.

Neither McNaughton nor the agents who interviewed him intended to negotiate a plea agreement on either November 24 or December 1, 1992. Neither interview included discussions of a guilty plea or negotiation about charges and neither agent made

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1. McNaughton also cites Fed. R. Evid. 410, which is identical in text and analysis. *See Sebetich*, 776 F.2d at 421 n.13.

any promises to McNaughton about sentencing. Furthermore, McNaughton could not reasonably have believed that Hilborn had authority to plea bargain, since Hilborn specifically told McNaughton that he was not authorized to make any promises. Finally, these discussions did not involve an attorney for the government; while the Third Circuit declined to reach the question of whether the new Rule 11(e)(6)(D) protects only formal plea negotiations with a government attorney, the absence of a attorney is a factor which weighs against a finding that the discussions were plea negotiations. *See Sebetich*, 776 F.2d at 422 n. 15. Upon consideration of the factors outlined in *Sebetich*, I conclude that McNaughton's statements were not made during the course of plea negotiations, and will not be excluded under Fed. R. Crim. P. 11(e)(6)(D)

As to statements made December 1, 1992

4. The statements of McNaughton made during the December 1, 1992 interview with government agents should not be suppressed pursuant to Pennsylvania Rule of Professional Conduct 4.2

McNaughton argues that the statements he made on December 1, 1992 should be suppressed because the government violated the ethical rule which prohibits communication between a lawyer and a party represented by another lawyer regarding the subject of the representation.

Rule 4.2 of the Pennsylvania Rules of Professional Conduct[2] ("Rule 4.2" or "the anti-communication rule") provides:

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2. The Pennsylvania Rules of Professional Conduct apply in actions before this court pursuant to Local Rule 14 of the United States District Court for the Eastern District of Pennsylvania.

Appendix C

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

In order to suppress McNaughton's statements of December 1, 1992, I would have to find: a) that the Rule would prohibit contact by Agent Perry, although he is not an attorney; b) that McNaughton was represented by counsel when Agent Perry discussed the investigation with him on December 1, 1992, and that Perry knew it; c) that McNaughton is entitled to the protection of the Rule; and d) that suppression is an appropriate remedy for such a violation.

a) I find that Agent Perry is subject to the requirements of the anti-communication rule to the same extent as the government attorneys. Pennsylvania Rule of Professional Conduct 8.4(a) prohibits a lawyer from using others to violate or circumvent the rules of professional conduct. Thus, Rule 4.2 bars communication by non-attorney government law-enforcement officers where those communications are made with the knowledge or at the direction of an attorney for the government. *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983) (no ethics violation where court found that government attorney was neither aware of nor involved in undercover contact with represented defendant); *United States v. Lemonakis*, 485 F.2d 941, 956 (D.C. Cir. 1973) (affirming admission of tape recording of conversation between informer and represented defendant in part because the informer was not acting as the "alter ego" of the U.S. Attorney's office), *cert. denied*, 415 U.S. 989 (1974); *see*

also Roger C. Crampton and Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 344 (1992) (collecting cases).

While there was evidence that attorneys for the government were aware of and working with the FBI and IRS in the investigation of this matter, there was no testimony as to whether Agent Perry interviewed Mr. McNaughton at the direction of or with the consent of an attorney for the government. The government points to this lack of evidence as support for a finding that Agent Perry was not acting as the "alter ego" of the prosecuting attorneys. It is the government's burden to establish that a challenged confession is admissible, however, not the burden of the defendant to show that it is not. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir.), *cert. denied*, 479 U.S. 989 (1986). The government has not established that Agent Perry was not acting at the request of an attorney for the government. I conclude therefore, on the basis of the record before me, that Agent Perry was acting as the "alter ego" of the prosecuting attorneys, and that he is therefore subject to the restrictions of the anti-communication rule to the same extent that they are.

b) I conclude that Richard McNaughton was not personally represented by counsel during the search of the Atlantic office on November 24, 1992, nor at any time before he was interviewed by Agent Perry. If he was personally represented by the company's attorneys at any time on November 24, 1992, it would appear that the representation ceased on November 25 or 26 when Atlantic's attorneys informed McNaughton that the company attorney would not represent him in an individual capacity and that he

would have to retain private counsel. *See* Pennsylvania Rule of Professional Conduct 1.13 and Comment.[3]

The inquiry does not end at this point, however, since Attorney Smida was clearly representing Atlantic in connection with this investigation on November 24, 1992, and that representation continued at least through December 1, 1992, when Agent Perry interviewed McNaughton. The official comment to Rule 4.2 states:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

As the Manager of Wholesale Fuel Sales for Atlantic, McNaughton clearly falls within the scope of the rule. Thus, while McNaughton was not personally represented, he was shielded from contact by the government attorneys and their

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3. A lawyer cannot represent both an organization and one of its officers if that representation would violate the rule against representing clients of adverse interest. "In such circumstances the lawyer should advise any constituent, whose interest that lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation."

alter-egos because of Smida's representation of Atlantic. FBI Agent Hilborn and Revenue Enforcement Officer Brennan were obviously aware of this representation, since they sought Attorney Smida's cooperation when they wished to ask McNaughton questions after the termination of the initial interview, and when they needed to discuss which items from his briefcase would be seized. FBI Agent Perry was aware that an attorney for Atlantic had been present during the search and had monitored McNaughton's interactions with the government agents (Finding of Fact #25). Atlantic was clearly an adverse "party" after it was served with the restraining order on November 24, 1992, and communication with McNaughton was prohibited by Rule 4.2.

c) McNaughton is not, however, entitled to the protection of the anti-communication rule in this circumstance.[4] Because McNaughton was not personally represented by an attorney, he had no attorney-client relationship to be violated. McNaughton has not argued that he can benefit from the government's invasion of Atlantic's attorney-client relationship, and would not have standing to do so in the context of a motion to suppress. *See Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (court may not suppress evidence on grounds that evidence was obtained in manner that violated rights of someone other than the defendant); *United*

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4. I need not determine whether McNaughton was a "party" because of my conclusion that he was not personally represented by any attorney when he spoke with Agent Perry on November 30 and December 1, 1992. Because Atlantic clearly was a "party" under any standard, having been served with a forfeiture order restraining its assets, I need not determine whether the anti-communication rule restricts government contact with represented criminal suspects before formal criminal proceedings begin. *Compare United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990) with *United States v. Ryans*, 903 F.2d 731, 735 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990).

States v. Payner, 447 U.S. 727, 735 N.7 (1980) (holding that evidence would not be suppressed on behalf of defendant without standing even where evidence was obtained through blatant police misconduct).

d) Even if I were to find that McNaughton could challenge admission of the December 1, 1992 interview because of the invasion of Atlantic's attorney-client relationship, I would not suppress the statements he made in that interview; suppression of evidence is not an appropriate remedy for an ethics violation. The Code of Professional Responsibility is not enforced under the constitutional exclusionary rule, but only under a federal court's general supervisory powers, which are subject to the control of Congress. *United States v. Crook*, 502 F.2d 1378, 1380-81 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975). In the Omnibus Crime Control and Safe Streets Act of 1968, Congress provided that '(i)f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence . . . ' 18 U.S.C. §3501(a). The court cannot, in exercising merely supervisory powers, disregard that congressional mandate. *Crook*, 502 F.2d at 1380. Where, as here, there is no constitutional violation, a district court is bound, in determining admissibility, by 18 U.S.C. §3501(a).[5] *Id.*

The fact that Atlantic, rather than McNaughton, is the party injured by the government's conduct makes suppression even less appropriate. In *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980), the Supreme Court stated:

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5. Since the Third Circuit held that the conduct in *Crook* did not violate the anti-contact rule, the statements regarding suppression are technically dicta. I believe, however, that the Third Circuit would have made the same determination as to suppression if it *had* found an ethical violation, since the same rationale would apply.

Appendix C

> Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the *defendant* in "willful disobedience of law" . . . This Court has never held however, that the supervisory power authorizes suppression of evidence obtained from third parties in violation of Constitution, statute or rule.

(emphasis in the original).

McNaughton's only response to this authority is to point out that the Second Circuit has approved suppression as one of the possible remedies for ethical rules violations. *United States v. Hammad*, 858 F.2d 834, 842 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). In the face of clear Third Circuit precedent, however, this authority is not persuasive. I will deny the motion to suppress.

ORDER

AND NOW, this 4th day of April 1994, the motion of defendant Richard McNaughton to suppress statements is **DENIED**.

s/ Anita B. Brody
Anita B. Brody, J.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 17, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

NO. 93-147 (-07, -10)

UNITED STATES OF AMERICA

v.

NADEZHDA SHNAYDERMAN and RICHARD MCNAUGHTEN

MEMORANDUM AND ORDER

AND NOW, this 16th day of December 1993, I have considered the motions of defendants Richard McNaughten and Nadezhda Shnayderman to suppress pen register and wiretap evidence and the government's response, as well as the arguments made by counsel for all parties at the motions hearing held in this matter of December 6, 1993, and I ascertain that:

Defendants are named in a ninety-seven count indictment which charges them with participating in a conspiracy to evade federal and state excise taxes on diesel fuel. During the investigation of this case the government obtained three court orders under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, authorizing the interception of communications over certain telephones.

Appendix D

Defendants challenge the admissibility of the evidence obtained through these wiretaps on four grounds:

a) that the affidavits upon which warrants were based relied upon the illegal and unconstitutional use of pen register devices;

b) that there was not probable cause to believe that the subject telephones were being used for criminal activity;

c) that there was no genuine need for the wiretaps, as required by Title III; and

d) that these offenses were not subject to Title III surveillance because they were essentially tax offenses.

A. THE USE OF PEN REGISTER DEVICES

Both McNaughten and Shnayderman urge the suppression of evidence obtained through the use of wiretaps because the government relied partly on evidence gathered from pen registers in the affidavits it attached to its applications for the wiretap warrants. Both defendants acknowledge that the United States Supreme Court has held that the use of pen register devices does not violate any "expectation of privacy" and therefore need not be authorized by a warrant or probable cause[1]. *Smith v. Maryland,*

1. Federal statute requires a court order before the implementation of a pen register, but the showing required to obtain such an order is minimal: the supporting affidavit need only identify the agency that is requesting the device and state that the affiant believes that use of the pen register will obtain information relevant to an ongoing criminal investigation by that agency. 18 U.S.C. 3122(b). The defendants do not deny that the pen registers used in this investigation were properly authorized.

442 U.S. 735, 745 (1979). The *Smith* decision was based upon the Supreme Court's determination that a pen register device is only capable of recording the number called and the fact of an incoming call, and is unable to actually intercept or "listen in" on the communication itself. *Id.*

Defendants argue, however, that advancing technology has made that determination obsolete; that most "pen register" devices currently used by law enforcement agencies — and probably those used in this case — convert to interception devices with the flick of a switch or the addition of earphones. Defendants argue that this potential for abuse requires this court to reevaluate the Supreme Court's holding in *Smith*. Defendants point out that the New York Court of Appeals has undertaken precisely that reexamination and has concluded that the potential for interception with modern pen register devices mandates that they be used only pursuant to a warrant issued upon probable cause. *See People v. Bialostok*, 610 N.E.2d 374, 377-78 (N.Y. 1993).

That decision, however, was based entirely on the requirements of the New York Criminal Procedure Law, not upon the Fourth Amendment. *Bialostok*, 610 N.E.2d at 377 ("The issue is not the reasonableness of the search but statutory compliance."). Defendants have not cited any federal decision, nor even any state court decision based upon the Fourth Amendment, that holds that the mere potential for an invasion of privacy implicates the Fourth Amendment. In the absence of any such authority, I am bound by the Supreme Court's decision that the use of pen register devices does not, per se, violate the Fourth Amendment. I can only hold differently in this case if there is a

showing that the devices were used in a way that violated the defendants' rights.[2]

The government has offered the affidavit of Special Agent John Terry, the FBI's case agent for the investigation which resulted in this indictment. Agent Terry avers that he questioned the technical personnel involved in the operation of the pen registers at issue, and to his knowledge, there was no unauthorized interception, or "listening in". Without more than the defendants' suspicions that the equipment could have been misused, I must deny the motion to suppress.

B. PROBABLE CAUSE

In order to obtain authorization for electronic surveillance, the government must show probable cause that the subject is engaged in specified illegal activity, that communications regarding such activity would be obtainable through use of the wiretap, and that the telephone to be monitored is being used in connection with that illegal activity. *United States v. Armocida,* 515 F.2d 29, 36 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975). Shnayderman urges suppression of the wiretap evidence on the grounds that there was not sufficient probable cause for the authorizing judges to find that the subject telephones were being used for criminal purposes.

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2. Defendant McNaughten urges this court to order disclosure by the government of the devices used and any history of abuse of them by FBI agents, arguing that the devices should be evaluated in light of the regular practice of those agents. But McNaughten has no standing to challenge violations of the Fourth Amendment committed against others, only actions which invade his own privacy. *Rakas v. Illinois,* 439 U.S. 128, 134 (1978). I must evaluate his challenge to the use of the pen register devices in the context of this investigation only.

This contention is without merit. The affidavit submitted by the government in support of its request to the Honorable Norma L. Shapiro, Judge of the Eastern District of Pennsylvania, for wiretaps of Myles Martin's residential and car phones, detailed the nature of the scheme, many of the key players, and the fact that they often communicated by telephone.[3] The affidavit also recited the incidence and content of conversations between Martin and the government's cooperating witness *on the lines for which interception was sought,* and disclosed pen register evidence of calls between Martin and most of the others named as participants in the scheme by the cooperating witness, also on the lines for which interception was sought.

The affidavit submitted to the Honorable Stephen Merryday of the Middle District of Florida contained the same information about the nature of the scheme and the identity of the key players, as well as evidence obtained through pen registers of numerous calls from telephones used by Gerald DiTursi to virtually all of the individuals and many of the companies implicated by the government's cooperating witness.

The affidavits clearly provided probable cause for the authorizing courts' determinations that the subject telephones were being used in the course of the illegal activity which was the subject of the government's investigation.

C. NECESSITY FOR THE WIRETAPS

In addition to showing the existence of probable cause, a government agent seeking authorization for a wiretap must also

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3. Most of this information was supplied by an individual the government identifies as "Cooperating Witness 1", a businessman who committed no crime, but assisted the government in its investigation.

demonstrate that other investigative procedures have been tried and failed, or that alternative procedures reasonably appear to be too dangerous or unlikely to succeed. 18 U.S.C. 2518(3)(c). Shnayderman argues that the government did not make that showing, justifying suppression of the wiretap evidence.

Because the authorizing judges' determination that the wiretaps are necessary is a factual one, I will review that determination only for abuse of discretion. *U.S. v. Phillips*, 959 F.2d 1187, 1189-90 (3d Cir.), *cert. denied*, 113 S. Ct. 497 (1992).

The Third Circuit has held that the authorizing judge's determination that the wiretaps were necessary should be upheld as long as there is a "factual predicate" for that finding in the affidavit supporting the application for the wiretap. *United States v. McGlory*, 968 F.2d 309, 345 (3d Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 415, 627, 1388 (1992); *Armocida*, 515 F.2d at 38. The affidavits submitted by the government in the Eastern District of Pennsylvania court and the Middle District of Florida both detailed the nine-month history of the investigation to that point, the limited nature of the cooperating witness's access to th details and organization of the scheme, the failure of early efforts to use undercover agents and the impracticability of their future use, and the limited utility of search warrants or a grand jury investigation at that point in the investigation. These affidavits clearly establish that a factual predicate existed for the authorizing judges' issuance of the wiretap warrants.

D. THE USE OF WIRETAPS TO INVESTIGATE TAX OFFENSES

McNaughten urges suppression of the wiretap evidence on the grounds that the wiretaps were improperly used to investigate

federal tax offenses. Federal law permits the use of wiretaps only for the investigation of crimes enumerated in 18 U.S.C. § 2516; federal tax evasion is not one of the enumerated crimes.

The orders by Judges Shapiro and Merryday authorizing the wiretaps did so for the investigation of a number of crimes involved in the alleged conspiracy which are enumerated in 18 U.S.C. § 2516: wire fraud, money laundering, currency violations, witness tampering and Racketeering. Since the warrants were not issued for the investigation of federal tax fraud, but for the investigation of enumerated offenses, those orders are valid.

While the government may not seek, and a court cannot authorize, a wiretap to investigate a crime not enumerated under § 2516, communications regarding a non-2516 crime gathered pursuant to a valid wiretap may be used in the prosecution of that crime if a court finds that the original wiretap warrant was sought "in good faith and not as a subterfuge search, and that the communication was in fact intercepted incidentally during the course of a lawfully executed order". *United States v. McKinnon,* 721 F.2d 19, 22 (lst Cir. 1983); *United States v. Vento,* 533 F.2d 838, 855 (3d Cir. 1976). The government must seek authorization to use these incidental communications by applying to a court for an order pursuant to the provisions of 18 U.S.C. § 2517(5).

The government applied for and obtained that authorization in orders from the Honorable Norma L. Shapiro dated September 22, 1992, and the Honorable Stephen D. Merryday, dated November 5, 1992. Both judges found that the "communications relating to the [non-2516 offenses] were intercepted incidentally and in good faith by Agents of the Federal Bureau of Investigation in the course of authorized interceptions".

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McNaughten has not raised a challenge to that determination and I will not review it without one. McNaughten has not presented me with a valid reason to suppress the wiretap evidence.

ORDER

AND NOW, this 16th day of December 1993, it is **ORDERED** that the Motions to Suppress Wiretap Evidence of defendants McNaughten and Shnayderman are **DENIED.**

s/ Anita B. Brody
ANITA B. BRODY, J.